Petition

81-678

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FORTY-FOUR HUNDRED EAST
BROADWAY COMPANY,

Petitioner.

v.

4400 EAST BROADWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner transferred real property to JOHN PAYE, pursuant to a conditional contract of sale. PAYE materially breached the contract before assigning the real property to Respondent ("Debtor") who then filed a Chapter XII bankruptcy petition claiming equitable ownership of the subject real property. The questions presented are:

1. Whether the Ninth Circuit's decision that Debtor, who prior to filing its Chapter XII petition had materially defaulted under a conditional contract for the sale of real property, had an equitable interest in the real property at the time of filing its Chapter XII petition sufficient to confer bankruptcy jurisdiction over the property pursuant to 11 U.S.C. §806(6), is in conflict with Arizona law which provides that a vendee's equitable interest in real property terminates upon a material default.

2. Whether a defaulting vendee's filing of a Chapter XII bankruptcy petition solely for the purpose of liquidating the property at a windfall profit rather than rehabilitating its business, is an abuse of the bankruptcy laws and a perversion of Congressional intent requiring dismissal of the bankruptcy proceeding.

3. Whether the Ninth Circuit, sitting as a court of equity, was duty bound to prevent Respondent, a debtor in possession, from benefiting from its subversion of a confirmed plan of arrangement that would have benefited its creditors.

4. Whether the subject contract of sale limited Petitioner exclusively to the remedies of a mortgagee, and if so, whether one of the remedites available to a mortgagee is recission.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties listed in the caption of this case.

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OPINIONS BELOW

The memorandum opinion of the Court of Appeals was not published and appears in Appendix A of the Appendix submitted herewith.

The memorandum order of the United States District Court for the Northern District of California, was not published and appears in Appendix B of the Appendix submitted herewith.

The order of the United States Bankruptcy Court for the Northern District of California was not published and appears in Appendix C of the Appendix submitted herewith.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Ninth Circuit was entered March 30, 1981. The order denying Petitioner's motion for reconsideration was entered June 10, 1981. This petition for certiorari was filed less than 90 days from the date denial of reconsideration was entered.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §802 of the Bankruptcy Act of 1898, as amended.

> §802. Application of other provisions
>
> The provisions of chapters 1 to 7 of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter.

Provided, however, that subdivision (n) of section 93 of this title shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters 1 to 7 of this title. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors" and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 822 of this title, and the date of adjudication shall be taken to be the date of the filing of the petition under section 821 or 822 of this title.

11 U.S.C. §806(6) of the Bankruptcy Act of 1898, as amended.

§806. In General

For the purposes of this chapter, unless inconsistent with the context -

. . .

(6) "debtor" shall mean a person, other than a corporation as defined in this title, who could become a bankrupt under

section 22 of this title, who files a petition under this chapter and who is the legal or equitable owner of real property or a chattel real which is security for any debt, but shall not include a person whose only interest in property proposed to be dealt with by the arrangement is a right to redeem such property from a sale but before the filing of such petition;

11 U.S.C. §811 of the Bankruptcy Act of 1898, as amended.

§811. Exclusive jurisdiction of debtor and property

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

18 U.S.C. §152. Crimes and Criminal Procedure

§152. Concealment of assets, false oaths and claims; bribery

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or

> property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; ...Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, FORTY-FOUR HUNDRED EAST BROADWAY COMPANY, is a California limited partnership. On November 26, 1976, Petiioner and JOHN PAYE entered into an executory land sale contract which called for Petitioner to conditionally transfer possession of its Tucson, Arizona real estate and office building ("the Tucson property") to PAYE for $3.3 million, payable $222,845.24 at the close of escrow with the balance in monthly installments for fifteen years. (CR 1 8/28 Memo, Ex. p.5)* Petitioner retained legal title to

---

* References are to the Clerk's Record below.

the Tucson property and was obligated to transfer title only upon full performance by PAYE. Time was expressly made of the essence of the contract.

Six months after signing the contract, PAYE defaulted by failing to make his monthly installment payments. Petitioner notified PAYE on October 21, 1977 of his default and demanded that it be cured by November 7, 1977 (CR 1 8/28 Memo Ex.B). PAYE failed to cure the default.* Instead, on December 13, 1977 he assigned his interest, if any, in the real property,, to his newly formed limited partnership, 4400 EAST BROADWAY ("Debtor"). Twenty-eight days later, Debtor filed a Chapter XII petition in the Bankruptcy Court for the Northern District of California. Debtor invoked federal jurisdiciton in the Bankruptcy Court pursuant to 11 U.S.C. §806(6), 811 and claimed the Tucson property as one of its

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* At the time of the default, PAYE had paid less than $70,000 on the $3.3 million purchase price, and in fact, he has not made a single installment payment in over four years.

assets. (CR 1 8/28 Memo p.3 Ex.B).

Paye's Actions Prior to Bankruptcy

During the period PAYE was in possession of the Tucson property, the encumbrances against it increased by nearly $500,000. (CR 1 9/6 Memo Ex.D). During this period, while PAYE was failing to make his contract payments, he was taking from the rent stream of the building almost all of his initial investment. (CR 1 8/28 EX.C). The funds taken by PAYE were used in part to make over $109,000. worth of improvements to his personal residence. (CR 15 EX.A).

In short, PAYE used the funds which should have been paid to Petitioner to pay for costly improvements to his personal residence.

Paye's Actions After Bankruptcy

On June 11, 1979, Lawyers Title Insurance Company, one of Debtor's creditors

in the Chapter XII bankruptcy proceeding, proposed a plan of arrangement calling for a $3.7 million cash sale of the Tucson property to the firm of DREVER-McINTOSH. The sale would have paid all creditors in full and would have covered all expenses of the Bankruptcy Proceedings. The plan was confirmed by the Bankruptcy Court subject to the condition that the sale close within forty (40) days. The sale did not close because PAYE and his agents, in violation of 18 U.S.C. §152, secretly paid DREVER-McINTOSH $20,000. not to close the sale. (CR 25, Exhibit B). PAYE did not disclose this secret payment to the Court or to Debtor's creditors (CR 15 p.15).

On July 30, 1979, immediately after the failure of the DREVER-McINTOSH sale, Debtor proposed a Third Amended Real Property Plan of Arrangement which called for the sale of the Tucson property to ALLSTATE INSURANCE

COMPANY for $4.2 million.*

Petitoner objected to the Plan (CR 1 Objections to Plan.) and filed an Amended Proof of Claim based on its ownership of the Tucson property, (CR 1 Amended Proof of Claim) holding that the bankruptcy court had no jurisdiction over the property.

Decisions By The Courts Below

The bankruptcy court denied Petitioner's claim, holding that the bankruptcy court had jurisdiction over the property:

> 3. Pursuant to the law of the State of Arizona, under the Subject Agreement, the Debtor owns the equitable title to the Subject Property, including all of the benefits attendant thereto, including an ownership of all of the equity in the Subject Property over and above Claimant's lien and the lien of other secured creditors.

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* This plan also failed when ALLSTATE withdrew its offer to purchase due to the failure of Debtor to satisfy conditions imposed by ALLSTATE under the plan.

> 4. As the Debtor is the owner of the equitable and beneficial title to the Subject Property this Court has jurisdiction over said real property.
>
> (Appendix C)

Petitioner appealed to the District Court, which affirmed, holding in part:

> This court also affirms the lower court's finding that the law of the State of Arizona applies in the interpretation of the contract. Under the language of the contract and applicable law, the appellee was the equitable owner of the property when the Chapter XII proceedings were instituted. Acordingly, the Bankruptcy Court had jurisdiction and authority over the property in the bankruptcy proceedings.
>
> (Appendix B)

Petitioner appealed to the Ninth Circuit Court of Appeals which on March 30, 1981 affirmed the District Court order, holding in part:

> The Bankruptcy Court and the District Court, applying Arizona law, correctly concluded that Debtor had an equitable interest in the subject property by virtue

of the doctrine of equitable conversion. See, e.g., Smith v. Tang, 100 Ariz. 196, 412 P.2d 697, 702-03 (1966); Lebrecht v. Beckett, 96 Ariz. 389, 396 P.2d 13, 15 (1964); Tucker v. Byler, 27 Ariz. App. 705, 588 P.2d 732, 736 (1976). Accordingly, the Bankruptcy Court has jurisdiction over the subject property. See 11 U.S.C. §§806(6), 811.

(Appendix A)

Petitoner's motion for reconsideration was denied on June 10, 1981. (Appendix E)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Upholding Bankruptcy Court Jurisdiction Based on the Court's Finding of Equitable Ownership Is In Direct Conflict With The Decisions of the Arizona Supreme Court

The Arizona Supreme Court has consistently held that where a vendee under a

contract for the sale of real property breaches the contract, and time is made of the essence of the contract, the vendee's breach is material and terminates his equitable interest in the property. Allen v. Martin (1976) 117 Ariz. 591, 593, 574 P.2d 457, 459; Goodman v. Newzona (1966) 101 Ariz. 470, 473, 421 P.2d 318, 320; Glad Tidings Church v. Hinkley (1951) 71 Ariz. 306, 312 226 P.2d 1016, 1022; Strum v. Heim (1964) 95 Ariz. 300, 303, 389 P.2d 702, 704; Trevillian v. Lee (1974) 111 Ariz. 229, 231, 527 P.2d 100, 101. Accord Watson v. Republic Life Insurance Co. of Dallas, Texas, 110 F.2d 801, 805 (9th Cir. 1940) holding that a material breach in a condition contract of sale terminates any equitable interest in the property created by that contract; In re Mesa Steel, 229 F. Supp. 669, 672 (D. Ariz. 1964).

In determining that "the bankruptcy court had jurisdiction over the [Tucson] property" under 11 U.S.C. §§806(6), 811, the Ninth Circuit held that the "Debtor has an equitable interest in the subject property by virtue of the doctrine of equitable conversion." The Ninth Circuit so held, despite the fact that it found that "time was made of the essence of the contract" and that Debtor "defaulted in its payments" under the Contract prior to filing a petition under Chapter XII of the Bankruptcy Act. (Appendix A)

The holding of the Ninth Circuit was thus in direct conflict with the decisions of the Arizona Supreme Court.

The doctrine of equitable conversion did not give PAYE an equitable interest "in

perpetuity". Goodman v. Newzona, supra p. 473. PAYE's failure to make timely installment payments was a material breach which, under Arizona law, terminated his equitable interest in the Tucson property. Goodman v. Newzona, supra, p. 473.

Since PAYE's equitable interest in the property terminated on November 7, 1977, he had no equitable interest to transfer to Debtor, his newly formed limited partnership, on December 13, 1977.

Therefore, Debtor did not have any "legal or equitable interest" in the Tucson property on January 11, 1978 when it filed its Chapter XII bankruptcy petition. Debtor was not a "debtor" under 11 U.S.C. §806(6). Consequently the Bankruptcy Court did not have jurisdiction over the property.

2. The Court Below Decided The Question of Bankruptcy Jurisdiction In A Way In Conflict With The Decision Of This Court In Bailey v. Baker Ice Machine Co.

In Bailey v. Baker Ice Machine Co., 239 U.S. 268, 36 S.Ct. 50, 60 L.Ed 275 (1915), this Court held that the bankruptcy court is bound by state law in determining ownership of property sold pursuant to a conditional sales contract and that for purposes of determining bankruptcy court jurisdiciton the court must look to:

> the condition of the bankrupt estate as of the time at which the petition was filed and the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. Everett v. Judson, 228 U.S. 474, 479. And see Zavelo v. Reeves 227 U.S. 625, 631. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in §47a as amended. 237 U.S. at 276.

The action of the Ninth Circuit in

upholding bankruptcy jurisdiction over Petitioner's real property, despite the fact that under Arizona law Debtor's equitable interest had terminated prior to its filing the bankruptcy petiton, cannot be squared with this Court's decision in Bailey.

The effect of the Ninth Circuit's decision is to confer bankruptcy jurisdiction based on an equitable interest Debtor had "anterior" to its filing the bankruptcy petiton; precisely what this Court in Bailey prohibited. 239 U.S. at 276 Accord, In re Lakes Laundry, 79 F.2d 326, (2nd Cir. 1935); In re Spanish Language Television of Arizona, 456 F.2d 159, 162-163; In re Yale Express Systems Inc.,370 F.2d 433 (2nd Cir. 1966).

3. This Case Presents A Novel And Important Issue Because Debtor's Use Of The Arrangement Provisions Of The Bankruptcy Act For Liquidation Not Rehabilitation Is An Abuse Of The Bankruptcy Laws Which, If Permitted, Would Have A Dangerous Effect On The Real Estate Market Throughout The United States

The filing of an arrangement petition under the bankruptcy laws for "the mere purpose of liquidation" is an abuse of the bankruptcy laws. Fidelity Assurance Assn. v. Sims, 318 U.S. 608, 621, 63 S.Ct. 807, 813, 87 L.Ed. 1032 (1943). Congress did not intend for reorganization proceedings under the bankruptcy laws to be turned into liquidation proceedings at the outset. It would be "perversion" of Congressional intent to allow a debtor to invoke an arrangement proceeding merely to liquidate its property. Fidelity Assurance Assn, supra at p. 621.

Yet that is precisely what has been done in this case. Debtor has abused the bankruptcy proceedings below by invoking the automatic stay provisions of Chapter XII, not for a rehabilitation of its "business", but rather to hold off creditors so that it could sell Petitoner's property, at a huge profit. All this was done at no risk to Debtor. The

Chapter XII proceeding was filed for the purpose of staving off creditors while Debtor searched for a buyer, figuring that the combination of the automatic stay provision and appreciation in value through inflation would provide it with a risk-free windfall profit. If no buyer is found, Debtor simply walks away leaving Petitioner to face Debtor's creditors.

The courts' rejection of this sort of manipulation was best stated by the Arizona Supreme Court in Glad Tidings Church v. Hinkley, supra, and the California Supreme Court in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 14. Thus is Glock the Court held, supra, at p. 14:

> It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee, without risk, could speculate indefinitely in the land of the unfortunate vendor. The

> vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or as in this case, over three years, after the date of the failure, make an offer to perform, and, if the land had risen in value, according to the theory of respondent herein, could compel performance, ...

Likewise, in Glad Tidings Church, the Arizona Supreme Court in precisely the same situation as presented here, held supra at p. 1022:

> A vendee in a contract for the purchase of land cannot lead vendor to believe he has abandoned the contract and then when the land had increased in value, secure the aid of equity to decree the specific performance of the contract.
>
> . . .
>
> It is also a maxim that he who seeks equity must first do equity. In the instant case... the Church was unable at any reasonable time after the default to raise the money necessary to pay the balance due. It was not

> until the property had increased in value sufficient so that the purchase price of $20,000 could be borrowed on the property itself that the Church then raised the amount specified in the contract by arranging for a loan on the property. This is not a case where equity is enforcing a forfeiture, but rather declining to relieve against one where no equitable grounds for relief exists. [Emphasis added].

In the present case, Debtor has invoked the equity jurisdiction of the bankruptcy court to profit from the use of Vendor's property. Debtor's action should not be sanctioned.

This case presents a novel and important issue. For if Debtor is permitted to succeed in its scheme, then it would create a blueprint for other vendees to likewise manipulate the liberal stay provisions under the bankruptcy laws in order to take a risk free gamble with other vendors' property.

In this era of high interest, when more and more sellers are entering into "owner" financing, the entire real estate market could collapse if the liquidation scheme sanctioned below is upheld.

4. The Court Below Has Sanctioned Such A Departure From The Accepted Standards of Equity That This Court Must Exercise Its Powers of Supervision To Insure That Equity Is Done

There is an overriding consideration that equitable principals govern the exercise of bankruptcy jurisdiction. Bank of Marin v. England, 385 U.S. 99, 103, 87 S.Ct. 274, 17 L. Ed. 2d 197 (1966); Pepper v. Litton, 308 U.S. 304-305. The court below, sitting as a court of equity was duty bound to see that equity was done. It did not do so.

What is most disturbing about the Ninth Circuit's holding is that it sanctioned Debtor's inequitable conduct. Debtor has

paid less than $70,000 for a $3.3 million building; has failed to make a single installment payment for over four years; has allowed the encumbrances against the building to increase by approximately $500,000; and has used monies from the rent stream of the building, which should have been paid to Petitioner, for expensive improvements to JOHN PAYE's personal residence.

Then realizing that failure to pay his obligations under the contract would result in loss of the property PAYE transferred the property to a limited partnership in order to file a Chapter 12 proceeding as a partnership and obtain the automatic stay and also thereby avoiding personal bankruptcy.

Once having acquired the proteciton of the bankruptcy court and safeguarding his own personal assets, Debtor criminally breached his fiduciary duty to that court and creditors

in the Chapter XII proceedings by subverting a plan of arrangement which had been confirmed by the Court (CR 25 Ex.B). The plan would have paid all creditors in full over two years ago but was subverted by Debtor solely in order that it might increase its chances to realize greater profits from further delay.

In contrast, Petitioner has done absolutely nothing inequitable. Therefore, this court must invoke its equitable powers to prevent Debtor from benefiting from its own wrongdoing.

5. The Court Below Committed A Reversible Error Of Law In Holding That Petitioner's Remedies Under Paragraph 23 Of The Contract Of Sale Were Limited To Those Of A Mortgagee Precluding Petitioner From Recovering Its Property From Debtor

It is generally held that remedies provided in a contract are permissive and are not exclusive unless the language of the contract clearly indicates an intent to make the remedy exclusive. Zancanaro v. Cross,

(1959) 85 Ariz. 394, 339 P.2d 746, 750; Lewis v. Rouse,(1925) 29 Ariz. 156, 240 p. 275, 276; In re Hale Desk Co., 97 F.2d 372, 373 (2nd Cir. 1938); Ryder Truck Rental, Inc. v. National Packing Co., 380 F.2d 330, 332 (10th Cir. 1967).

The mere fact that the contract provides a specific remedy not otherwise available does not mean that such remedy is exclusive of other remedies provided by law. Zancararo v. Cross (1959), 85 Ariz. 394, 339 P.2d 746, 750 ("the parties to a contract may specify certain remedies. . . they may in addition make such provision the exclusive remedy . . . to obtain this result, however, the intent of the parties must be made clear.").

In the present case, the language "shall then have the right" in Paragraph 23

of the contract* is clearly permissive, not mandatory. Nothing in Paragraph 23 requires Vendor to pursue an action as if it wre a mortgag[ee]; it merely gives Vendor the right to do so in addition to the other remedies available to it at law.

Under Arizona law, Paragraph 23 cannot be construed as exclusive unless the language of the paragraph clearly indicates an intent by the parties to make it exclusive.

---

* Paragraph 23 provides in pertinent part:

> Upon default by [Debtor] under the terms of this Agreement [Vendor] shall give [Debtor] notice of said default and [Debtor] shall have twenty(20) days thereafter to cure said default. If such default is not cured,[Vendor] shall have the right to pursue an action at law or suit in equity for the purpose of obtaining the legal or equitable relief available to [Vendor], as if it were a mortgagor and the within agreement created a mortagee interest in said real property. However, nothing herein shall be deemed to create or constitute this agreement a mortage or other security device. [Emphasis added].

Zancanaro v. Cross, supra. Here Paragraph 23 does not provide that in the event of default Vendor "shall" pursue an action at law or suit in equity as if it were a mortgagee, nor does it provide that in the event of default Vendor "must" pursue an action at law or suit in equity as if it were a mortgagee. Nor does it provide that in the event of default that Vendor's "sole" or "only" remedy "shall be" an action at law or a suit in equity as if it were a mortgagee, all of which are words that would indicate that the remedy was exclusive. Yet this is precisely the language the lower court has written into the contract in determining that the remedy is exclusive.

Moreover, even if Paragraph 23 could be read as limiting Petitioner's remedies to those of a mortgagee, Petitioner would still be entitled as a mortgagee, to rescind

the contract. Leigh v. Lloyd (1951) 74 Ariz 84, 244 P.2d 356. Petitioner should be allowed to do so.

C O N C L U S I O N

For these reasons a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals, and to declare that the Bankruptcy Court is without jurisdiction over Petitioner's property.

Respectfully submitted,

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September 4, 1981

APPENDIX A

(Memorandum Opinion of
the Ninth Circuit)

FILED

MAR 30 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

DOCKETED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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FORTY-FOUR HUNDRED EAST BROADWAY COMPANY,	)	
Plaintiff-Appellant,	)	No. 80-4388
vs.	)	D.C. No. C79-3094-SW
4400 EAST BROADWAY,	)	MEMORANDUM
Defendant-Appellee.	)	

On Appeal From the United States District Court
for the Northern District of California
Spencer Williams, Judge, Presiding

Argued and Submitted March 11, 1981

BEFORE: WALLANCE AND POOLE, Circuit Judges, and
HALBERT, * District Judge

Appellant Forty-Four Hundred East Broadway Company (Claimant) appeals from the Bankruptcy Court's denial of its claim of

*Hon Sherrill Halber, Senior District Judge, United States District Court for the Eastern District of California, sitting by designation.

ownership of the subject property which was affirmed by the District Court. We likewise affirm.

Claimant and appellee 4400 East Broadway (Debtor) entered into a conditional land sales contract transferring real property located in Tucson, Arizona. The contract provided that Claimant, the vendor, would retain legal title until full performance by Debtor, the vendee, and that Debtor was entitled to possession so long as it was not in default. Time was made of the essence. Debtor subsequently defaulted in its payments and filed a petition under Chapter XII of the Bankruptcy Act.1/

Claimant's principal contention on appeal is that Paragraph 23 of the conditional land sales contract2/ did not provide the exclusive remedy on default, and that therefore Debtor's default automatically terminated Debtor's equitable interest in the property.

1/ 11 U.S.C. § 801 et seq. This action was brought under the Bankruptcy Act of 1898, as amended. That Act has since been replaced by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. All references herein to provisions of the Bankruptcy Act refer to the Bankruptcy Act of 1989, as amended.

2/ Paragraph 23 provides, in pertinent part:

If such default is not cured, [Claimant] shall then have the right to pursue an action at law or suit in equity for the purpose of obtaining the legal or equitable relief available to [Claimant] as if it were a mortgagor [sic] and the within Agreement created a mortgage interest in said real property. However, nothing herein shall be deemed to create or constitute this agreement a mortgage or other security device.

The language of the contract, whether read as a whole, see Brobeck, Phleger & Harrison v. Telex Corp., 502 F. wd 866, 872 (9th Cir. 1979), or with specific reference to Paragraph 23, provides an exclusive remedy in the event of default. Contrary to Claimant's assertion, Paragrpah 21 of the contract, which provides that Debtor is entitled to possession so long as it is not in default, is not inconsistent with an exclusive remedy of foreclosure. Paragraph 21 expressly refers only to the right to possession, and does not affect Debtor's equitable interest. There is no language purporting to effect automatic forfeiture of Debtor's equitable of Debtor's equitable interest on default.

The Bankruptcy Court and the District Court, applying Arizona law, correctly concluded that Debtor has an equitable interest in the subject property by virtue of the doctrine of equitable conversion. See, e.g., Smith v. Tang, 100 Ariz. 196, 412 P. 2d 597, 702-03 (1966); Lebrecht v. Beckett, 96 Ariz. 389, 395 P. 2d 13, 15 (1964); Tucker v. Byler, 27 Ariz. App. 705, 558 P. 2d 732, 736 (1976). Accordingly, the Bankruptcy Court has jurisdiction over the subject proeprty. See 11 U.S.C. §§ 806(6), 811.

Claimant's contention that equity and public policy require its claim of ownership to be sustained is without merit.

The judgment is affirmed.

APPENDIX B

(Judgment and
Memorandum Opinion of
District Court)

ORIGINAL
FILED
MAY 30 1980
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FORTY-FOUR HUNDRED EAST BROADWAY COMPANY,	)	
Plaintiff,	)	
v.	)	No. C 79-3094 SW
FORTY-FOUR HUNDRED EAST BROADWAY,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that Judgment be entered in the above-captioned matter for appellee.

Dated: MAY 30 1980

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

ORIGINAL
FILED
MAY 30 1980
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FORTY-FOUR HUNDRED EAST BROADWAY COMPANY,	)	
Appellant,	)	
v.	)	No. C 79-3094 SW
FORTY-FOUR HUNDRED EAST BROADWAY,	)	
Appellee.	)	

This is an appeal from the Bankruptcy Court's order denying the Appellant's claim of ownership of certain real property in Tucson, Arizona. This Court notes that the District Court as a court of review must accept Findings of Fact made by the Bankruptcy Court unless those Findings are clearly erroneous. In re California Associated Products Co., 183 F. 2d 946 (9th Cir. 1950). On questions of law, however, the District Court is free to make an independent

determination of the law. In re Newcomb Interests, 171 F. Supp. 704 (N.D. Cal. 1959).

The Appellant's contend the lower court's interpretation of the Contract for Sale and Exchange was reversible error. The Appellant specifically objects to the holding of the Bankruptcy Court that the contract limits the Appellant's remedies on default to those of a mortgagee. [In briefs and at oral argument the Appellant argued this interpretation rewrote the contract of sale from a land sale contract into a mortgage.]

This argument misinterprets the Bankruptcy Court's holding. The lower court did not rewrite the contract of sale into a mortgage. [It found, however, that the language of Paragraph 23 of the contract specifically set out the remedies of the parties on default.]

As this court noted at oral argument, the contract is not a form contract in which the parties filled in the blanks. The document was carefully written by attorneys for the parties. The language of the contract itself, rather than general principles of contract law, must control when there is no ambiguity. In this case, the language of the contract, whether read as a whole or with specific reference to Paragraph 23, indicates the parties intended Appellant's remedies on default to be exclusively

that of a mortgagee under a mortgage. The lower court did not error in so finding.

This court also affirms the lower court's finding that the law of the State of Arizona applies in the interpretation of the contract. Under the language of the contract and applicable law, the appellee was the equitable owner of the property when the Chapter XII proceedings were instituted. Accordingly, the Bankruptcy Court had jurisdiction and authority over the property in the bankruptcy proceedings.

The court, having duly considered the briefs, and oral arguments of the parties, hereby AFFIRMS the Order of the Bankruptcy Court.

IT IS SO ORDERED.

Dated: MAY 30 1980

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

APPENDIX C

(Bankruptcy Court
Order, Finding of Fact and
Conclusions of Law)

FILED
FEB 11 1980
WALTER T. MONIZ, Clerk
United States Bankruptcy Court
San Jose, California

LODGED
FEB 5, 1980
WALTER T. MONIZ, Clerk
United States Bankruptcy Court
San Jose, California

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Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of 4400 EAST BROADWAY, A California Limited Partnership, Debtor.	Bankruptcy No. 578-00088-M

ORDER

The Court having entered its ORDER SUSTAINING DEBTOR'S OBJECTION TO AMENDED PROOF OF CLAIM on October 23, 1979; Claimant FORTY FOUR HUNDRED EAST BROADWAY COMPANY (hereinafter

referred to as "Claimant") having appealed said Order to the United States District Court; the United States District Court having remanded the case to this Court for a determination of this Court's jurisdiction and for a determination of the ownership of that certain real property commonly referred to in these proceedings as 4400 East Broadway, Tucson, Arizona; the parties having submitted their memoranda of points and authorities; the matter having come on for hearing pursuant to an agreement by and between the parties on January 25, 1980; the Debtor having appeared by and through its counsel Murray & Murray and John Walshe Murray, and Crist, Crist, Bryant, Schulz & Biorn and Robert E. Schultz; the Claimant having appeared by and through its counsel Rose & Kornhauser, and Samuel Kornhauser and M. Fred Rose; Findings of Fact and conclusions of Law having been entered concurrently herewith;

IT IS HEREBY ORDERED that the EXCHANGE AGREEMENT AND CONTRACT OF SALE, a copy of which is attached to Claimant's Proof of Claim filed with this Court on March 16, 1979, is a valid, binding and enforceable agreement and sets forth the respective rights and interests of the parties in the aforementioned real property;

IT IS HEREBY FURTHER ORDERED that the Debtor is the owner of the beneficial interest

in the aforementioned real property; and

IT IS HEREBY FURTHER ORDERED that Claimant's interest in the aforementioned real property is that of a secured creditor and arises out of and is determined by the provisions of the subject agreement.

Dated: Feb 11, 1980

/s/ Warren . Moore
BANKRUPTCY JUDGE

FILED
FEB 11 1980
WALTER T. MONIZ, Clerk
United States Bankruptcy Court
San Jose, California

LODGED
FEB 5, 1980
WALTER T. MONIZ, Clerk
United States Bankruptcy Court
San Jose, California

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Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of 4400 EAST BROADWAY, A California Limited Partnership, Debtor.	Bankruptcy No. 578-00088-M

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE JURISDICTION AND OWNERSHIP OF PROPERTY

The Court having entered its ORDER SUSTAINING DEBTOR'S OBJECTION TO AMENDED PROOF

OF CLAIM on October 23, 1979; Claimant FORTY-FOUR HUNDRED EAST BROADWAY COMPANY (hereinafter referred to as "Claimant") having appealed said Order to the United States District Court; the United States District Court having remanded the case to this Court for a determination of this Court's jurisdiction and for a determination of the ownership of that certain real property commonly referred to in these proceedings as 4400 East Broadway, Tucson, Arizona; the parties having submitted their memoranda of points and authorities; the matter having come on for hearing pursuant to an agreement by and between the parties on January 25, 1980; the Debtor having appeared by and through its counsel Murray & Murray and John Walshe Murray, and Crist, Crost, Bryant, Schulz & Biorn and Robert E. Schulz; the Claimant having appeared by and through its counsel Rose & Kornhauser, and Samuel Kornhauser and M. Fred Rose; the Court having entered its Order concurrently herewith, it hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 25, 1975, John Paye, the general partner and assignor of 4400 EAST BROADWAY, a California Limited Partnership, the Debtor (hereinafter referred to as the "Debtor") and Claimant entered into an EXCHANGE AGREEMENT

AND CONTRACT OF SALE (hereinafter referred to as the "Subject Agreement"). The Subject Agreement, which is attached to Claimant's Proof of Claim filed on March 16, 1979, was accepted into evidence by this Court on September 6, 1979.

2. The Subject Agreement provides, inter alia, for the sale of that certain real property commonly referred to in these proceedings as 4400 East Broadway, Tucson, Arizona (hereinafter referred to as the "Subject Property") by the Claimant to the Debtor.

3. On January 11, 1978, the Debtor filed a Petition seeking relief under Chapter XII of the Bankruptcy Act.

4. The Subject Agreement does not contain any provisions regarding the forfeiture.

5. Paragraph No. 23 of the Subject Agreement reads as follows:

> "23. Remedies on Default
>
> Upon default by Paye under the terms of this Agreement, Partnership shall give Paye notice of said default. If such default is not cured, Partnership shall then have the right to pursue an action at law or suit in equity forthe purpose of obtaining the legal or equitable relief available to Partnership, as if it were a mortgagor [sic] and the within Agreement created a mortgage interest in said real property. However, nothing herein shall be deemed to create or constitute this agreement a mortgage or other security device."

6. While the Subject Agreement may be characterized as a land sales contract, Paragraph No. 23 of the Agreement specifically states that the remedies available to the Claimant on the event of a default are exclusively that of a mortgagee under a mortgage.

7. Claimant has not initiated the proceedings comtemplated in Paragraph No. 23 of the Subject Agreement.

8. While Claimant holds a bare legal title to the Subject Property, the Debtor is the equitable and beneficial owner of said property, and the owner of the equity in said property.

9. On March 16, 1979, Claimant filed its Proof of Claim with this Court claiming the status of a secured creditor.

10. On August 28, 1979, Claimant filed its Amended Proof of Claim as a creditor.

11. At the hearing before this Court on August 21, 1979 regarding confirmation of the Debtor's Third Amended Real Property Plan of Arrangement, Claimant went on record affirmatively consenting to confirmation of said Plan of Arrangement.

CONCLUSIONS OF LAW

1. The Subject Agreement is a valid, binding and enforceable agreement and sets forth the respective rights and interests of the parties in the Subject Property.

2. The law of the State of Arizona shall apply in interpreting the rights of the parties to the Subject Agreement.

3. Pursuant to the law of the State of Arizona, under the Subject Agreement, the Debtor owns the equitable title to the Subject Property, including all of the benefits attendant thereto, includign an ownership of all ofthe equity in the Subject Property over and above Claimant's lien and the liens of other secured creditors.

4. As the Debtor is the owner of the equitable and beneficial title to the Subject Property, this Court has jurisdiction over said real property.

5. Pursuant to the law of the State of Arizona, under a land sales contract, the Claimant holds no more than a bare legal title to the Subject Property as a naked trustee for the Debtor vendee, to whom all beneficial interest has passed.

6. Claimant has no rights other than those of a secured creditor.

7. The law of the State of Arizona does not give vendors under a land sales contract a right of automatic forfeiture. The right to an automatic forfeiture exists only when specifically provided for in a contract itself.

8. Pursuant to the law of the State of Arizona, under a land sales contract, it

is irrelevant that the entire contract purchase price has not yet been paid. Conversion of the ownership of the property takes place immediately upon execution of the land sales contract.

9. Arizona Rev. Stat. § 33-741 applies to land sales contracts which specifically contain automatic forfeiture clauses and does not give a vendor under a land sales contract a right to forfeiture when the contract does not so provide.

10. Arizona Rev. Stat. § 33-741 does not give a vendor under a land sales contract a right to forfeiture, but rather provides the vendee under a land sales contract a mandatory grace period within which to cure a default and thus avoid forfeiture when such a right to forfeiture is provided for in the contract.

11. Arizona Rev. Stat. § 33-742 does not give the vendor under a land sales contract a right to forfeiture, but rather allows the vendee to reinstate a land sales contract by performing those of his obligations which have matured, and thus avoiding having the contract declared completely due and payable.

12. Pursuant to the law of the State of Arizona, forfeitures are not favored by the law and if an agreement providing for a forfeiture is capable to two constructions, that which

is against the forfeiture should be followed.

13. Pursuant to the law of the State of Arizona, a "time is of the essence" clause does not give a vendor under a land sales contract a right to forfeiture.

14. Pursuant ot the law of the State of Arizona, the parties to a land sales contract may provide what their relief shall be in case of a breach, and if the contract so provides, the parties will be limited to the remedies set forth in the contract.

15. Pursuant to the law of the State of Arizona, a mortgagee must foreclose the mortgagor's interest in the real porperty by bringing an action in a Court.

16. Pursuant to the law of the State of Arizona, a mortgagor retains its ownership interest in the property until such time as the mortgagee institutes an action in a court nad secures a judgment. Additionally, the mortgagor has a right to redeem the property within six months after the date the property is sold pursuant to a foreclosure judgment.

17. In re Spanish Language Television of Arizona (9th Cir. 1972) 456 F. 2d 159 is inapplicable to the instant proceedings as it concerns a personal property conditional sales contract under the superceded Uniform Conditional Sales Act.

18. The opinion of the Ninth Circuit Court of Appeals in Watson v. Republic Life Ins. Co. of Dallas, Texas (9th Cir. 1940) 110 F. 2d 797, 805, to the extent that it states that in Arizona, a vendee under a land sales contract has no interest in the property, is no longer an accurate assessment of Arizona law.

19. By filing a Proof of Claim, and an amendment thereto, claiming the status of a secured creditor, Claimant has admitted its status of a secured creditor, and equity now estops Claimant from asserting an ownership interest in the subject property.

20. Implicit in this Court's Order of August 21, 1979 confirming the Debtor's Third Amended REal Property Plan of Arrangement, is the finding that this Court had jurisdiction over the real property being sold pursuant to said Plan of Arrangement. As no appeal was taken from this Order of Confirmation and hence, from the implicit finding of jurisdiction, said finding is res judicata.

21. By affirmatively consenting to the Debotr's Third Amended Real Property Plan of Arrangement, Claimant has implicitly acknowledged this Court's jurisdiction over the subject real property being transferred in said Plan, and is not estopped to claim the Court lacks jurisdiction over said

property.

22. Claimant's allegations of bad faith are irrelevant to a determination of this Court's jurisdiction or to a determination of ownership in the Subject Property.

Dated: Feb 11, 1980 /s/ Warren C. Moore
BANKRUPTCY JUDGE

APPENDIX D

(Ninth Circuit Order
Re Reconsideration)

FILED
JUN 10 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORTY-FOUR HUNDRED EAST BROADWAY COMPANY,	)	
Plaintiff-Appellant,	)	No. 80-4388
vs.	)	D.C. No. C79-3094SW
4400 EAST BROADWAY,	)	ORDER
Defendant-Appellee.	)	

Appeal from the United States District Court
For the Northern District of California

Before: WALLACE and POOLE, Circuit Judges, and HALBERT,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.

R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*Honorable Sherrill Halbert, Senior United States District Judge, Eastern District of California, sitting by designation.

APPENDIX E

(Entry of Appearance)

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FORTY-FOUR HUNDRED EAST
BROADWAY COMPANY,

Petitioner.

v.

4400 EAST BROADWAY

ENTRY OF APPEARANCE

I, WALTER WINTER, admitted to the Bar of the Supreme Court October Term 1980 enter my appearance in this case.

WALTER WINTER

AFFIDAVIT OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 712 Sansome Street, Second Floor, San Francisco, California, 94111. On ~~September 8~~ October 7, 1981, I served the foregoing Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit, by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully paid, in the United States mail at San Francisco, California, on the following address:

John Murray
Murray & Murray
550 Hamilton Avenue
Palo Alto, California 94301

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ~~September 8~~ October 7, 1981, at San Francisco, California.

Miriam Christine Hom

Opposition

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS

No. 81-678

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FORTY-FOUR HUNDRED EAST
BROADWAY COMPANY,
Petitioner,

vs.

4400 EAST BROADWAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 81-678

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FORTY-FOUR HUNDRED EAST BROADWAY COMPANY,
Petitioner,

VS.

4400 EAST BROADWAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 26, 1976, the assignor of 4400 East Broadway, a California Limited Partnership and the Debtor/Respondent herein (hereinafter "Respondent"), entered into a contract entitled "Exchange Agreement and Contract of Sale" (hereinafter the "Contract") with Forty-Four Hundred East Broadway Company (hereinafter "Petitioner") pursuant to which Respondent purchased from Petitioner certain real property (hereinafter the "Property") located in Tucson, Arizona. Under the terms of the Contract, Petitioner, as vendor, is owed the principal sum of $600,045.24 plus interest and such attorney's fees as the Bankruptcy Court below may award.

Over a year after the Contract was executed and Respondent went into possession, the Respondent was forced to initiate a Chapter XII Bankruptcy proceeding before the United States Bankruptcy Court for the Northern District of California (hereinafter "Bankruptcy Court") to prevent the holder of the first mortgage from foreclosing, and to protect the equity in the Property for its own benefit and for that of junior lienholders, including Petitioner.

On March 16, 1979, Petitioner filed its Proof of Claim in the Bankruptcy Court. Said claim clearly provides that Petitioner is a secured creditor.

On July 30, 1979, Respondent filed its Third Amended Real Property Plan of Arrangement which provided for a sale of the Property and payment in full to all creditors. Thus, the plan provided for Petitioner's claim to be paid in full.

On August 20, 1979, Petitioner filed an objection to confirmation of the Respondent's plan, essentially alleging that the plan was not proposed in good faith, and that the plan was not in Petitioner's best interest, because the gain to be realized on the sale of the Property really belonged to it and not to Respondent.

At the August 21, 1979 hearing on confirmation of Respondent's plan, Petitioner withdrew its objection to the confirmation of the plan and at the conclusion of that hearing, the Bankruptcy Court entered an Order confirming the plan. As part of that Order, the Court made the finding that the plan had both been proposed and its acceptance procured in good faith.

Thereafter, Petitioner filed its Amended Proof of Claim. It was with this Amended Proof of Claim that Petitioner *first* asserted its entitlement to Respondent's equity in the Property. Moreover, the entire basis of that contention rested upon Petitioner's allegation of Respondent's lack of good faith in initiating the Chapter XII proceeding, proposing the plan and consummating its confirmation. Subsequently, Respondent objected to Petitioner's Amended Proof of Claim. The Bankruptcy Court sustained Respondent's objection because the Court found the underlying factual assertion supporting that claim had already been found contrary to Petitioner's position. In the course of sustaining Respondent's objection to the amended claim, the Bankruptcy Court found that the proper amount of Petitioner's claim was, and is: the principal sum of $600,045.24 plus interest in the amount of $14,184.72 from January 15, 1977 through September 1, 1979 increasing at a rate of $429.84 per month thereafter.

Petitioner appealed that decision to the United States District Court for the Northern District of California (hereinafter "District Court"). Upon review, the District Court remanded the case to the Bankruptcy Court, observing that:

> "[t]he question of ownership of the 4400 East Broadway property and hence the jurisdiction of the Bankruptcy Court over the property has never been directly addressed or adjudicated on the merits. Since resolution of this issue is crucial to the Bankruptcy Court's ability to dispose of the property and implement any arrangement, the court remands this case to the Bankruptcy Court for further determination of this question."

In its Order of Remand, the District Court suggested three areas of inquiry:

1. What law should apply in interpreting the Contract?

2. Is the Contract a land sale contract or a mortgage?

3. Did Petitioner reserve the jurisdictional issue when it withdrew its objection to the confirmation of the Plan at the August 21, 1979 hearing or did its consent to the plan waive the jurisdictional issue?

A hearing was subsequently conducted before the Bankruptcy Court on January 21, 1980 for the purpose of resolving the issues raised in the Order of Remand. Prior to that hearing, both Respondent and Petitioner submitted briefs in support of their respective positions. At that hearing, the Bankruptcy Court ruled in favor of Respondent holding that (1) Petitioner had no right of forfeiture under the Contract; (2) Respondent was the equitable owner of the Property; and (3) the Bankruptcy Court has competent jurisdiction over Respondent and the Property. On February 11, 1980, the Bankruptcy Court entered Findings of Fact and Conclusions of Law (set forth in Appendix C to the original Petition for Writ of Certiorari heretofore filed by the Petitioner with this Court).

Also, on February 11, the Bankruptcy Court entered its Order as follows:

> "IT IS HEREBY ORDERED that the EXCHANGE AGREEMENT AND CONTRACT OF SALE, a copy of which is attached to Claimant's Proof of Claim filed with this Court on March 16, 1979, is a valid, binding and enforceable agreement and sets forth the

respective rights and interests of the parties in the aforementioned real property;

IT IS HEREBY FURTHER ORDERED that the Debtor is the owner of the beneficial interest in the aforementioned real property; and

IT IS HEREBY FURTHER ORDERED that the Claimant's interest in the aforementioned real property is that of a secured creditor and arises out of and is determined by the provisions of the subject agreement."

Succinctly put, the Bankruptcy Court found that the Contract was indeed a contract of sale with respect to real property and which resulted in the transfer of equitable title and interest to Respondent. The Court further found that pursuant to the express terms of the Contract (i.e., paragraph 23 thereof which is set forth verbatim on page 20, *infra*), in the event of Respondent's default thereunder, Petitioner was entitled to pursue an action at law or suit in equity as if it were a mortgagee and the Contract created a mortgage interest in the Property. Put another way, the Bankruptcy Court found that a forfeiture of the Property to Petitioner was neither required, appropriate, or allowable under Arizona law. Petitioner appealed that Order. Thereafter, both parties submitted briefs on appeal.

The District Court heard Petitioner's appeal and affirmed the judgment of the Bankruptcy Court on May 30, 1980. Thereafter, Petitioner moved to have the District Court reconsider its May 30, 1980 judgment. On June 2, 1980, the District Court denied Petitioner's motion, and on July 28, 1980, Petitioner filed its Notice of Appeal to the

United States Court of Appeals for the Ninth Circuit (hereinafter "Circuit Court").

The Circuit Court heard Petitioner's appeal and affirmed the judgment of the District Court on March 30, 1981. Thereafter, the Circuit Court denied Petitioner's Petition for Rehearing. The Circuit Court's Mandate was filed on July 8, 1981. Subsequently, the Petition for Writ of Certiorari was filed with this Court.

SUMMARY OF ARGUMENT

1. Under Arizona law, upon execution of a land sales contract, equitable title passes to the vendee under that contract. Accordingly, in the instant case, equitable title to the Property passed to Respondent upon the execution of the Contract. Moreover, because the Contract contains no forfeiture provision, such title remains with Respondent even after a default under the Contract.

2. Because such equitable title was vested in Respondent on January 11, 1978, the day the Chapter XII Petition was filed, the Bankruptcy Court had, and continues to have, jurisdiction over the Property. Nothing in this Court's decision of *Bailey v. Baker Ice Machine Co.* (1915) 239 U.S. 268, warrants a contrary result. To the contrary, neither the facts nor the legal principles discussed in the *Bailey* case have the remotest connection to the facts and/or the legal principles involved in the instant matter.

3. The sale of a debtor's real property through a Chapter XII reorganization proceeding is entirely proper. 11 U.S.C. § 861 sets forth the mandatory and permissive provisions of a Chapter XII real property arrangement. Sub-

section (12) thereof provides in pertinent part that a plan ". . . should provide adequate means for the execution of the arrangement, which may include . . . the sale of all or any part of [the debtor's] property . . ."

4. Petitioner's contentions of Respondent's alleged misconduct are groundless and not supported by one scintilla of evidence introduced in these proceedings. Petitioner alleges that Respondent paid less than $70,000.00 for the Property when in fact the purchase price was over $3,000,000.00. It has been Petitioner's prosecution of various appeals, rather than Respondent's conduct, that has prevented a reorganization of the Property and the appropriate resolution of Petitioner's claim. These unfounded allegations of Petitioner along with the other ones set forth in Section 4 of its Petition have no basis in fact and cannot provide a basis for issuance of a Writ of Certiorari.

5. Petitioner's remedy on Respondent's default under the Contract are governed by, and limited to those of a "mortgagee" as set forth in Paragraph 23 of the Contract. Respondent submits that Paragraph 23 of the Contract clearly expresses the parties' intent to create an exclusive remedy. Current Arizona law makes it clear that parties to a contract are confined to those remedies which are set forth in the Contract. It has long been the law of Arizona that where parties to a contract provide therein precisely what the remedy shall be in the case of a breach, they will be limited in their remedy by the terms of the contract. The specific description of Petitioner's rights upon default as set forth in Paragraph 23 of the Contract exclusively defines Petitioner's remedy, and Petitioner may not rescind or seek a forfeiture of the Property.

Petitioner cites cases to support its dubious contention that the language in Paragraph 23 does not limit its remedies, but rather allows it the option of either foreclosing or demanding strict forfeiture of Respondent's interest in the Property. However, unlike Paragraph 23 of the Contract, the cases Petitioner cites all involve agreements which *by their terms* provided that the remedies mentioned in the Contract *were not* exclusive.

ARGUMENT

1. Arizona's Doctrine of Equitable Conversion Caused Equitable Title to the Property to Vest in Respondent Upon Execution of the Contract. Such Interest Remains With Respondent, Even After Default, Because the Contract Contains No Forfeiture Provision.

A reason for granting a Writ of Certiorari has traditionally existed if a decision of a circuit court of appeals on an issue of state law is in conflict with a decision rendered by the highest court of such state (*Query:* whether this is still so as new Supreme Court Rule 17 omits as a consideration governing review on certiorari a federal court of appeals decision that resolves "an important state . . . question in a way in conflict with applicable state . . . law" — which such ground was previously set forth in former Rule 19).

More importantly, however, Petitioner's contention at p. 11, *et seq.*, of its Petition that the Circuit Court's ruling is in conflict with the laws of the State of Arizona is simply wrong. Petitioner has consistently argued throughout each level of these proceedings that the doctrine of equitable conversion is not recognized by the courts of Arizona. That

doctrine provides that under a land sales contract, the purchaser becomes the equitable owner of the land and the vendor becomes the equitable owner of the purchase money. Consistently, each court below has held against Petitioner. *Why?* Because, the doctrine of equitable conversion *is* recognized by Arizona courts. *Tucker v. Byler* (1976) 27 Ariz. App. 705, 558 P.2d 732. Although the vendor remains the legal owner of the property, he holds it as a "naked trustee for the purchaser *to whom all the beneficial interest has passed.*" (emphasis added.) See also, *Shreeve v. Greer* (1946) 65 Ariz. 35, 173 P.2d 641.

Whether or not the purchaser has paid or tendered the entire contract price does not alter the result. "Conversion of property takes place immediately upon the execution of the land sales contract." *Lebrecht v. Beckett* (1964) 96 Ariz. 389, 396 P.2d 13. *Tucson Federal Savings and Loan Association v. Sundell* (1970) 106 Ariz. 137, 472 P.2d 6. The Arizona Supreme Court in *Tucson Federal Savings and Loan Association* made the pertinent finding that at the moment the buyer made a down payment of $25.00 on a land sales contract, she acquired an interest in the land. *Tucson Federal Savings and Loan Association v. Sundell,* supra, 472 P.2d at 10. Furthermore, the Arizona Supreme Court has described the interest of the buyer under the doctrine of equitable conversion as "alienable, defendable and devisable in like manner as real estate held by a legal title" and that the interest of the vendee under a contract "is an equitable title to the real estate and whoever subsequent thereto takes legal title takes it subject to the right of the holder of the contract of purchase to enforce the

[equitable title]." *Lebrecht v. Beckett* (1964) 96 Ariz. 389, 396 P.2d 13, 15 and 16, respectively.

Accordingly, the Circuit Court's holding that Respondent has an equitable interest in the subject property by virtue of the doctrine of equitable conversion is not in conflict with the decisions of the Arizona Supreme Court. Thus, Section 1 (p. 11-14) of the Petition presents no basis for the issuance of a Writ of Certiorari.

Petitioner has likewise consistently argued throughout these proceedings that under the laws of Arizona ". . . where a vendee under a contract for the sale of real property breaches the contract, and time is made of the essence of the contract, the vendee's breach is material and *terminates* his equitable interest in the property." (Petition at p. 11-14.) Petitioner's failure to sustain this position below results from its failure to recognize that under the laws of Arizona, before a forfeiture can result pursuant to a contract of sale, *the contract must contain an express forfeiture provision.* With one possible exception, the contracts involved in all of the cases cited by Petitioner on this point contained such express forfeiture provisions. The Contract in the instant case does not.

The only case Petitioner has cited for the proposition that a vendor, by *operation of the law,* has the right to declare a forfeiture upon the purchaser's breach is that somewhat dated Ninth Circuit Court of Appeals case of *Watson v. Republic Life Insurance Co. of Dallas, Texas,* 110 F.2d 797, 805 (9th Cir. 1940). This case is one in which a federal court attempted to interpret what the Arizona Supreme Court would hold under a given factual context,

as opposed to an actual decision of the Arizona Supreme Court. The court based its conclusions on its examination of two Arizona cases, and observed that in Arizona, contrary to the rule in most jurisdictions, a buyer in such a context had no interest in the property. Furthermore, the court in *Watson* found the Arizona cases to refer to the purchaser's interest as an "equity" rather than an "equitable title". From this observation, the court in *Watson* concluded that the purchaser had no interest in the realty, and as a consequence, the vendor could declare a forfeiture of the purchaser's interest.

Since the *Watson* decision was rendered, the Arizona Supreme Court has announced that Arizona follows the majority view that such a purchaser is considered the equitable owner of the property with a valuable equitable interest in the property, thereby overruling by implication the basis of the *Watson* decision. *Shreeve v. Greer* (1946) 65 Ariz. 35, 173 P.2d 641; *Lebrecht v. Beckett* (1964) 96 Ariz. 389, 396 P.2d 13, 16; *Tucker v. Byler* (1976) 27 Ariz. App. 705, 558 P.2d 732, 736; *Wayt v. Wayt* (1979) 123 Ariz. 444, 600 P.2d 748, 750. Additionally, it is important to note that *Watson v. Republic Life Insurance Co. of Dallas* has never been cited as authority by the Ninth Circuit Court of Appeals, any Arizona court, or by the court of any other jurisdiction, so that its holding has always been of dubious authority on Arizona law.

Respondent respectfully submits that the lower Courts' ruling that equitable title to the Property passed to Respondent pursuant to the Contract is correct. Moreover, such equitable title remains with Respondent, even after

default, because the Contract contains no forfeiture provision. Accordingly, Petitioner's position on these issues presents no basis for the issuance of a Writ of Certiorari.

2. The Bankruptcy Court Has Jurisdiction Over the Property.

A conflict between a decision of a Circuit Court of Appeals and a decision of the United States Supreme Court is, undoubtedly, the most persuasive ground for the issuance of a Writ of Certiorari. However, Petitioner's suggestion at p. 14, *et seq.* of its Petition that the Circuit Court's ruling in the instant case is in conflict with this Court's decision in *Bailey v. Baker Ice Machine Co.* (1915) 239 U.S. 268, is nothing short of ludicrous. Neither the facts nor the legal principles discussed in the *Bailey* case have the remotest connection to the facts and/or the legal principles involved in the instant matter. *Bailey* is a so-called "preference" case in which a bankruptcy trustee attempted to avoid an alleged pre-petition transfer. There, a vendor of certain equipment purchased by the bankrupt prior to bankruptcy attempted to reclaim the equipment through the Bankruptcy Court. In adjudicating the preference question, the issue arose as to whether the underlying documentation should be characterized as: (i) a conditional sales contract [where legal title remains in the vendor]; or (ii) an absolute sale with a chattel mortgage back [where legal title passes to the vendee]. In resolving that issue, this Court simply determined that under the laws of the *State of Kansas* in the year *1911*, that particular contract for the *sale of personal property* was a conditional sales contract. Respondent respectfully submits that as

such, it is impossible for the *Bailey* case to be in conflict with the instant case involving, as it does, issues relating to *real property* arising under the *laws of the State of Arizona* in the year *1976*.

Moreover, the language of the *Bailey* case quoted by Petitioner at p. 15 of its Petition is both misquoted and taken out of context. Petitioner would appear to rely on the quoted language to support its contention that the Bankruptcy Court below lacked jurisdiction over the Property on and after January 11, 1978, the day the Chapter XII Petition was filed. However, the quoted language deals not with jurisdiction but rather with the point in time from which a bankruptcy trustee is to have the status of a lien creditor. More to the point, Respondent would direct this Court to an earlier statement it made in *Bailey* —i.e., "the exclusive jurisdiction of the Bankruptcy Court is so far in rem that the estate is regarded as in custodia legis from the filing of the Petition." (239 U.S. at p. 276.) As Respondent clearly owned its equitable interest in the Property on January 11, 1978, the Bankruptcy Court clearly has jurisdiction over the Property.

Petitioner next cites *In re Spanish Language Television of Arizona,* 456 F.2d 159 (9th Cir. 1972) and *In re Lake's Laundry,* 79 F.2d 326 (2d Cir. 1935), in apparent support of its proposition that where a vendee defaults on a conditional sales contract, the property should not be included in the vendee's bankruptcy estate. What Petitioner fails to mention is that the above opinions are not applicable law in the present case.

On p. 161 of the *Spanish* case the Court begins its holding by stating:

> "The basic premise of RCA's argument is that property sold under a security agreement, such as that here involved, permitting a vendor to retain title to goods delivered into the possession of a buyer, is not to be included among the buyer's assets if he becomes bankrupt. *Although such a contention is not supportable if an agreement is governed by the Uniform Commercial Code,* it finds support in the provisions of the Uniform Conditional Sales Act (U.C.S.A.) which was in effect in Arizona when the contract between RCA and TV was made." (emphasis added.)
>
> Footnote 3 provides: "The Uniform Commercial Code expressly denies the importance of the purported location of the "title" in determining contractual rights (§ 9-902): Hence, the property sold under agreements governed by the Code are subject to the jurisdiction of district courts and bankruptcy actions. See *In re Yale Express Systems, Inc.*, 370 F.2d 433; 436-437 (2d Cir. 1966)."

Accordingly, Petitioner's argument regarding jurisdiction is based on a case that is no longer even applicable to personal property because of the passage of the Uniform Commercial Code and a case that was never applicable to a real estate land sales contract, as the Bankruptcy Court below so found in its Conclusion of Law No. 17.

More importantly, real property land sales contracts are completely distinguishable from personal property conditional sales contracts. For example, the Uniform Commercial Code applies only to personal property conditional

sales contracts (Section 9-102) and expressly excludes from its coverage any and all interests in real property (Section 9-104(j)). A land sales contract is a widely employed security device used in the place of a deed of trust or mortgage. See generally, *California Real Estate Secured Transactions,* Cont. Ed. Bar, 1970, Chapter 3, part V, Land Contract as a Security Device. See also, Comment, *Installment Contracts for the Sale of Land: Waiver of Time of the Essence Clause,* 18 Arizona L. Rev. 799 (1976).

Since a land sale contract is actually a real property security device, any cases dealing with personal property conditional sales contracts, even if still applicable, have no relevance to the present proceeding. Petitioner's reliance on the *Spanish* case is therefore misplaced. For the same reasons, *In re Lake's Laundry,* supra, and *In re Yale Express Systems, Inc.,* 370 F.2d 433 (2d Cir. 1966), fail to support Petitioner's argument.

It is respectfully submitted that the Circuit Court's ruling below is not in conflict with the *Bailey* case or any other decision of this Court. Neither *Bailey* nor the other cases cited by Petitioner provide any basis for either denying the Bankruptcy Court's jurisdiction over the Property or for the granting of a Writ of Certiorari.

3. The Sale of a Debtor's Real Property Through a Chapter XII Reorganization Proceeding Is Entirely Proper.

At page 16, *et seq.* of its Petition, Petitioner suggests that the initiating of a Chapter XII proceeding which might ultimately encompass the sale of the debtor's property is somehow an abuse of the bankruptcy laws which, in turn, somehow presents a "novel and important issue"

to this Court. Petitioner is simply wrong in its assertion that a Real Property Arrangement which contemplates the sale of the real property is improper.

11 U.S.C. § 861 sets forth the mandatory and permissive provisions of a Chapter XII real property arrangement. Subsection (12) thereof provides in pertinent part that a plan ". . . . shall provide adequate means for the execution of the arrangement, which may include . . . the sale of all or any part of [the debtor's] property . . ." Moreover, Congress' intent to allow for the liquidation of a debtor's property through a Chapter XII proceeding is further evidenced in 11 U.S.C. § 413(2) which states: ". . . the court may . . . authorize . . . the debtor . . . to . . . sell any property of the debtor, whether real or personal, upon such terms and conditions as the court may approve."

Petitioner cites *Fidelity Assurance Ass'n. v. Sims* (1943) 318 U.S. 608, for the proposition that a liquidating Chapter XII is improper. Petitioner neglected to point out that the *Fidelity* case does not deal with a Chapter XII proceeding but rather with a Chapter X proceeding. Likewise, Petitioner's citation of the *Glock* case and the *Glad Tidings* case is equally as perplexing as: (i) neither case deals with the appropriateness of a liquidating reorganization proceeding; and (ii) neither case remains "good" law in its respective jurisdiction.

With respect to so-called "liquidating" arrangements, future cases, and the real estate market as discussed by Petitioner at pp. 20-21 of its Petition, it is important to note that Congress has recently spoken to these questions

in its enactment of the Bankruptcy Code of 1978, effective October 1, 1979. The new Bankruptcy Code merges the previous reorganization chapters (i.e., Chapters X, XI, XII) into one reorganization chapter—i.e., Chapter 11 of the new Code. Thus, any reorganization involving real propety filed after October 1, 1979 is, and will continue to be, filed under new Chapter 11. 11 U.S.C. § 1123 sets forth the mandatory and permissive provisions of a plan filed in a new Chapter 11 proceeding. Subsection (b)(4) of this section provides that a plan may "provide for the sale of *all* or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests"– (emphasis added). The legislative history to this subsection appropriately notes that the section allows for a "liquidating" plan of reorganization. House Report No. 95-595, 95th Cong., 1st Sess. (1977) 406; Senate Report No. 95-989, 95th Cong., 2nd Sess. (1978) 118. Thus, there has never been, nor will there in the future be, anything improper with a sale of property in a real property reorganization proceeding.

Petitioner's contentions to the contrary are merely an ineffective attempt to create a so-called "public policy" argument where none exists. In its Memorandum of Decision, the Circuit Court correctly observed that the Petitioner's ". . . contention that equity and public policy require its claim of ownership to be sustained is without merit."

Petitioner has not been inequitably treated in these proceedings. When the Contract was executed, equitable title to the Property vested in Respondent and Petitioner

became a Secured Creditor. These Chapter XII bankruptcy proceedings were initiated to prevent the holder of the first mortgage from foreclosing and to protect both the position of the Respondent as well as that of Petitioner as a junior lien creditor. When the subject property is sold, Petitioner will be paid the full amount of its claim including interest through the date of payment. This result is fair and appropriate. It certainly does not present a "novel and important" issue which would justify the issuance of a Writ of Certiorari.

4. Petitioner's Contentions of Respondent's Alleged Misconduct are Groundless and Unsupported by Any Evidence.

The Respondent finds it necessary to point out that throughout the various stages of this litigation, Petitioner has made certain factual allegations that are untrue and unsupported by any evidence. [The only evidence offered and/or received by the trial court was the Contract itself.] In Section 4 of its Petition, Petitioner repeats these allegations as follows:

1. *Purchase Price:* Petitioner alleges that Respondent paid less than $70,000.00 for the Property. This allegation is untrue. The purchase price was, in fact, over $3,000,000.00.

2. *Length of Proceedings:* Petitioner argues that it has not received a payment from Respondent for some time and as a result, the Petitioner is being inequitably treated. This Court should be aware that Respondent has been unable to proceed with its reorganization proceeding for over two years because of Petitioner's legal position.

Had it not been for Petitioner's appeals, the Property would most likely have been sold some time ago, and all creditors, including Petitioner, would have been paid in full.

3. *Recoupment of Investment:* Petitioner alleges that John Paye, Respondent's assignor, has recouped almost all of the initial investment in the subject Property. Petitioner also alleges that John Paye diverted funds from Respondent for his personal use. These bare allegations likewise are unsupported by any of the evidence introduced in these proceedings.

4. *Transfer of Property:* At p. 22 of its Petition, Petitioner suggests that the transfer of the Property from Mr. Paye to the Debtor was in some fashion improper. To the contrary, all of the parties to the Contract knew from the beginning that the Property would be assigned to Respondent limited partnership.

5. *Criminal Conduct:* Petitioner also alleges that the Debtor's general partner is in violation of the provisions of 18 U.S.C. § 152. Again, this statement is false and unsupported by any evidence before this Court.

As there is no evidence whatever before this Court, or any of the lower Courts with respect to these unfounded allegations, they remain just that—allegations. As such they cannot possibly present a basis for the issuing of a Writ of Certiorari. While Petitioner is quite correct in its assertion that a bankruptcy court is a court of equity, neither a court of equity nor a court of law can administer justice in a context of unplead and unproven allegations.

5. Petitioner's Remedy on Respondent's Default Under the Contract Is Governed By, And Limited To, Those of a "Mortgagee" as Set Forth in Paragraph 23 of the Contract.

Petitioner posits as a ground for seeking the issuance of a Writ of Certiorari its contention that the Circuit Court erred in holding that Petitioner's remedies on a default under the Contract were governed by, and limited to, those set forth in Paragraph 23 thereof.

In its Petition and in its briefs below, Petitioner cites numerous cases for the proposition that express provisions in a contract for a remedy are permissive and not exclusive unless the language of the contract clearly indicates an intent to make the remedy exclusive. Notwithstanding Petitioner's assertions, Respondent submits that Paragraph 23 of the Contract clearly expresses the parties' intent to create an exclusive remedy. Paragraph 23, titled "Remedies on Default" provides that:

> "23. *Remedies on Default*
>
> Upon default by Paye [Debtor's Assignor] under the terms of this Agreement, Partnership [Claimant] *shall* give Paye notice of said default and Paye *shall* have twenty (20) days thereafter to cure said default. If such default is not cured, Partnership *shall* then have the right to pursue an action at law or suit in equity for the purpose of obtaining the legal or equitable relief available to Partnership, as if it were a mortgagor [sic] and the within Agreement created a mortgage interest in said real property. However, nothing herein shall be deemed to create or constitute this agreement a mortgage or other security device." (emphasis added.)

Under the terms of Paragraph 23, Petitioner is not given the option of choosing whatever remedy suits it at the time of default, but is limited to the remedies the law affords to a mortgagee. Thus, Petitioner is not entitled to reclaim title to the subject property but can only recover the balance of the purchase price still owed to it under the Contract.

Petitioner contends that Arizona law governs the Contract, and appears to argue that remedies provided for in a contract can never be exclusive unless the contract explicitly states that the remedies specified therein shall be exclusive. Simply put, this is not the law of Arizona.

Current Arizona case law makes it clear that parties to a contract are confined to those remedies which are set forth in the contract. *Green v. Snodgrass,* 29 Ariz. 319, 289 P.2d 191 (1955); *Camelback Land and Investment Co. v. Phoenix Entertainment Corp.,* 2 Ariz.App. 250, 407 P.2d 791 (1965); *Wilson v. Pate,* 17 Ariz.App. 250, 498 P.2d 535 (1972); *Treadway v. Western Cotton Oil & Ginning Co.,* 40 Ariz. 125, 10 P.2d 371 (1932); *Armstrong v. Irwin,* 26 Ariz. 1, 221 P. 222 (1923).

It has long been the law of Arizona that where parties to a contract provide therein precisely what the remedy shall be in case of a breach, they will be limited in their remedy by the terms of the contract. *Treadway v. Western Cotton Oil & Ginning Co.,* 40 Ariz. 125, 10 P.2d 371, 374 (1932). Paragraph 23 particularly describes Petitioner's remedy to be that of a mortgagee under a mortgage. Thus, under Arizona law, this specific description of Petitioner's rights upon default exclusively defines Petitioner's remedy

to be that of a mortgagee under a mortgage. Thus, under Arizona law, this specific description of Petitioner's rights upon default exclusively defines Petitioner's remedy, and Petitioner may not rescind or seek a forfeiture of the Property.

Petitioner cites cases to support its dubious contention that the language of Paragraph 23 does not limit its remedies, but rather allows it the option of either foreclosing on or demanding strict forfeiture of Respondent's interest in the Property. However, Petitioner's argument ignores the determinative factor in the cases it cites—the actual language of the contracts in question.

Unlike Paragraph 23 of the Contract, the cases Petitioner cites involved agreements which *by their terms* provided that the remedies mentioned in the contract were *not* exclusive. Thus, in *Zancanaro v. Cross,* 85 Ariz. 394, 339 P.2d 746, 749 (1950), cited by Petitioner, the contract there in question stated in pertinent part that:

> ". . . if there is any unusual delay in the construction of the building at any time the plumbing contractor *may, at his option* . . . claim reasonable additional compensation which shall be determined solely by the plumbing contractor . . . or, be relieved from all obligations to commence or continue said work any further, as the case may be, and be entitled to recover for the proportionate part of the work done, if any, without completion of the contract, . . ."

The Court in *Zancanaro,* based its ruling on the specific language of the contract, taking special note of the fact that the agreement expressly gave the plaintiff the *option*

of taking the remedial measures provided by that contract. *Zancanaro*, supra at p. 750. Instead of unthinkingly applying the generalized legal principle urged by Petitioner, the *Zancanaro* court carefully examined the particular language of the contract at hand and found that it expressly made the remedies mentioned by that contract non-exclusive.

Petitioner also cites the case of *Lewis v. Rouse*, 29 Ariz. 156, 240 p. 275 (1925). However, in *Lewis*, the court found that the contractual remedy was alternative whereas the Bankruptcy Court here has already concluded that Paragraph 23 is an exclusive remedy. Accordingly, neither *Lewis* nor *Zancanaro* control the interpretation of the Contract. Likewise, *Ryder Truck Rental, Inc. v. National Packing Co.* 380 F.2d 328 (10th Cir. 1967) is equally unconvincing as it involved a contract which by its terms provided that the remedy of public sale was not exclusive.

In summary then, it is the position of Respondent, the Bankruptcy Court, the District Court, and the Circuit Court, that the Petitioner's remedies are limited by Paragraph 23 of the Contract. Even if there were no such limitation, there is certainly no right of automatic forfeiture. Accordingly, Respondent respectfully submits that the lower Courts have not erred and that, accordingly, the issuance of a Writ of Certiorari is neither necessary nor appropriate.

CONCLUSION

When Petitioner and Respondent entered into the Contract, Respondent became the owner of the Property and Petitioner became a secured creditor of Respondent. Rather than accepting its secured creditor status, Petitioner wishes to reclaim ownership of the property thereby not only receiving payment in full, but also appropriating Respondent's interest in the property. Such a result is abhorrent both to the laws of the State of Arizona as well as to the federal laws on Bankruptcy. It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: November 4, 1981

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